

## GUIDELINES FOR COURT-ANNEXED MEDIATION

Mediation is a flexible, non-binding dispute resolution procedure in which a neutral third party, the mediator, facilitates negotiations between the parties to assist them with settlement. A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often going beyond the legal issues in controversy. Mediation sessions are confidential and structured to help parties communicate, to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling and generate settlement options. The mediator, who may meet jointly or separately with the parties, serves as a facilitator and does not issue a decision or make findings of fact.

Judges of the United States Court of International Trade are available throughout the pretrial phase of all litigation to conduct judge-hosted sessions of mediation. A judge may serve as the Judge Mediator in any case referred for mediation, provided it is not a case in which he or she is the presiding judge, and he or she is not otherwise disqualified to serve in accordance with Title 28 U.S.C. §455 and the Canons of Judicial Ethics.

These Guidelines are intended to govern the procedures for Court-Annexed Mediation unless otherwise ordered by the assigned judge or Judge Mediator.

### I. REFERRAL

Any judge may make an Order of Referral to Court-Annexed Mediation in any case assigned to him or her. The Order may be in response to a consent motion from all the parties which requests mediation, in response to a motion from one or more parties, or may be issued *sua sponte* by the assigned judge.

The original Order of Referral to Court-Annexed Mediation will be filed with the Clerk's Office and copies served upon the parties. A copy of the Order also all will be provided to the judge who has agreed to serve as Judge Mediator in the case.

The Order of Referral will provide for a maximum number of days within which the parties must complete the mediation process. All proceedings (including motion practice and discovery) shall be stayed for a period of ninety (90) days from the date of the Order of Referral, unless the judge assigned, on the judge's own initiative or upon a motion of a party, for good cause shown, provides for a longer or shorter stay, or limits the scope of the stay.

A Form "Order of Referral to Court-Annexed Mediation" is attached to these Guidelines as **Form - M1**.

## **II. PROCEEDINGS AFTER REFERRAL**

### **(A) Submission of Position Papers and Documents.**

Within fifteen (15) days of the Order of Referral, counsel for each party shall prepare and submit to the Judge Mediator confidential memoranda of no more than ten (10) pages, which shall:

1. Identify the party with actual authority to negotiate a settlement of the case;
2. State the relevant facts in the action;
3. State the key legal issues in the action;
4. Identify what discovery would improve the prospects for settlement;
5. State the pertinent factors relating to settlement;
6. State the party's initial settlement position; and
7. Identify the names of all counsel and other persons who are expected to attend any scheduled mediations; such identification will include the title of each such person, and: a) in the case of a party who is an individual, whether such person will be attending as a representative of that individual or in some other capacity (e.g., witness, assistant), or b) in the case of a party who is an entity, whether the person is appearing as counsel of record or as an attorney (or another representative) with authority to recommend a settlement or in some other capacity (e.g., witness, assistant).

Copies of the confidential memoranda submitted directly to the Judge Mediator should not be served on opposing counsel, are not to be filed with the Clerk's Office, and are not to be of record in the action.

### **(B) Mediation Sessions.**

Within thirty (30) days of the Order of Referral, the Judge Mediator will notify the parties of the time, date, and place of the mediation session and whether it will be conducted in person, telephonically, or by videoconference. Unless the Judge Mediator directs otherwise, except in the case of a party who is an individual, all sessions of mediation must be attended by counsel of record and an attorney (or another representative) with authority to recommend a settlement (who may be one and the same). In the case of a

party who is an individual, unless excused by the judge or Judge Mediator, the individual or a representative who has actual authority to settle the action shall attend. The Judge Mediator may meet with counsel and the parties jointly or ex parte. The Judge Mediator may conduct one or more sessions of mediation.

(C) Confidentiality of Mediation Proceedings.

All statements made at and all materials shared or submitted by a party during a session of mediation shall be confidential, unless during the course of the mediation a party, its representative or its counsel agrees that anything submitted in confidence to the Judge Mediator by or on behalf of that party may be disclosed to another party, its representative or counsel, in furtherance of the mediation (provided that such disclosure is not also the subject of any specially agreed upon confidentiality terms).

Except as provided for above, the Judge Mediator shall not discuss with or disclose to the assigned judge or anyone else the statements made or information developed during the mediation process. The attorneys and other persons attending the mediation are likewise prohibited from disclosing statements made or information developed during the mediation process. The parties are prohibited from using any information obtained in the mediation process in any motion or argument to any court. The sessions of mediation shall be considered compromise negotiations under Rule 408 of the Federal Rules of Evidence. Notwithstanding the foregoing, the bare fact that a settlement has or has not been reached as a result of mediation shall not be considered confidential. Nothing in this provision, however, shall preclude any party or other person from obtaining, outside of the mediation proceedings, any matter which a party may lawfully obtain through independent means, such as discovery, any matter which is not otherwise privileged, regardless of whether the party or person learned about the existence of such information from the mediation proceedings, unless the information was expressly disclosed after an agreement that precludes such discovery.

Additionally, notwithstanding the foregoing, nothing shall preclude the court, when the interests of justice may require, such as to prevent the commission of a crime, to order, after notice and hearing, that any confidential information be disclosed for such limited purposes.

(D) Settlement.

No party shall be bound by statements or actions at a session of mediation unless a settlement or other written agreement is reached. If an agreement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement. The agreement shall be signed by all parties and their respective counsel (who may be one and the same when counsel have been authorized to sign on behalf of a party). If such an agreement includes a dismissal, in whole or in part, of the action, then

the parties will file an appropriate dismissal, pursuant to Rule 41, or stipulated judgment, pursuant to Rule 58.1. Such papers will be filed with the court within thirty (30) days after the settlement or other written agreement is signed or the action will be returned to the active calendar, unless such period is extended by the judge assigned to the action on the judge's own initiative or upon motion filed by a party, for good cause shown.

(E) Report of Mediation.

Upon conclusion of the mediation process, the Judge Mediator shall file promptly a Report of Mediation which indicates whether the action has settled in whole or in part. The original Report of Mediation will be filed with the Clerk's Office and copies served upon the parties. A copy of the Report also all will be provided to the referring judge assigned to the action.

A Form "Report of Mediation" is attached to these Guidelines as **Form - M2**.

(F) Extensions of Deadlines and Modification of Terms of Stay.

Nothing contained in these guidelines precludes the judge assigned to the action (or the Judge Mediator, as to a deadline relating to the planning or conducting of the mediation once the action has been referred to a Judge Mediator) from extending the time periods set forth in these guidelines, unless such extension will result in the time allowed for the mediation to extend beyond the time period of the stay set forth in these guidelines. In that event, such extension may only be granted by the judge assigned to the action or by the Judge Mediator in consultation with and with the concurrence of the judge assigned to the action. Extensions may be allowed by the judge or the Judge Mediator, on the judge's or Judge Mediator's own initiative or upon motion of a party, for good cause shown. Further, nothing in these guidelines precludes the judge assigned to the action, at any time, upon the judge's own initiative, pursuant to the recommendation of the Judge Mediator, or upon motion of a party, for good cause shown, from determining that the action should not be stayed pending the completion of mediation, or from excluding certain activities that a party may be permitted or required to perform from the stay, or from otherwise modifying the terms or length of the stay so as to facilitate the conduct of the mediation or to avoid undue delay or hardship in the final determination of the action.

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